IN THE

Supreme Court of the United States

No. 638.,
October Term, 1937.

APEX HOSIERY COMPANY,
Petitioner,

against

WILLIAM LEADER and AMERICAN FEDERATION OF FULL FASHIONED HOSIERY WORKERS, PHILADELPHIA BRANCH No. 1, Local 706
Respondents.

BRIEF FOR WORKERS DEFENSE LEAGUE AS *AMICUS CURIAE*

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March 22, 1940.

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May It Please the Court:

Workers Defense League, as amicus curiae, submits this brief in support of the judgment of the United States Circuit Court of Appeals for the Third Circuit, reversing a judgment of the District Court of the United States for the Eastern District of Pennsylvania, which held the respondents liable to triple damages under Section 4 of the Clayton Act (Act of October 15, 1914, 38 Stat. 730, Title 15, Sec. 15, U. S. C. A.).

It will be the purpose of this brief to establish:

That a labor union, by means of a strike, may intentionally and substantially restrain interstate commerce, without thereby rendering either it or its members liable to triple damages under Section 4 of the Clayton Act, provided that the ultimate purpose of such strike be to organize, or to bargain collectively, or to improve working conditions or wages, and that such restraint of interstate commerce be merely a necessary and appropriate means to such end.

This brief will undertake to show that, so far as prior decisions or dicta of this Court may be inconsistent with this proposition, those decisions and dicta are in conflict with

public policy as declared by Congress under the Norris-La Guardia Act (March 23, 1932, c.90, 47 Stat. 70, Title 29, Sec. 101-115, U. S. C. A.).

I.

The provisions of the Norris-La Guardia Act, forbidding the issuance of injunctions against a union or its members in connection with strikes growing out of any labor dispute, are neither expressly nor impliedly limited to strikes which do not restrain interstate commerce, but were intended to, and must necessarily extend to strikes which restrain such commerce.

It cannot be seriously suggested that, while labor unions and their members may not be enjoined from conducting such strikes, they may conduct them only with the certainty of liability for triple damages.

The legislative history of the Norris-La Guardia Act, as well as the decisions of this Court itself construing that Act, conclusively establish that the purpose of the Norris-La Guardia Act was to carry out what Congress had intended to effect by the enactment of Sections 6 and 20 of the Clayton Act, but which intention had been defeated by the judicial construction given by this Court to those sections of that Act.

In *Negro Alliance* v. *Sanitary Grocery Company*, 303 U. S. 552; 82 Law Ed. 1012, Mr. Justice Roberts, speaking for the Court, said, at page 562:

> "The legislative history of the (Norris-La Guardia) Act demonstrates that it was the purpose of the Congress further to extend the prohibitions of the Clayton Act respecting the exercise of jurisdiction by federal courts and to obviate the results of the judicial construction of that Act."

As instancing the judicial construction referred to, the nion cites in a footnote the cases of *Duplex Printing Press mpany* v. *Deering*, 254 U. S. 443, 65 Law Ed. 349, and *erican Steel Foundries* v. *Tri-City Central Trades Coun-* 257 U. S. 184, 66 Law Ed. 189.

The same footnote also refers to House Report No. 669, d Congress, First Session, Senate Report No. 1060, 71st ngress, Second Session, and Senate Report No. 163, 72nd ngress, First Session.

At page 3 of the House Report, it is stated:

> "The purpose of the bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act, October 15, 1914 (38 Stat. L. 738), which Act, by reason of its construction and application by the Federal courts, is ineffectual to accomplish the congressional intent."

At pages 7 and 8 of the same report, specific reference is de to the decisions of this Court construing the Clayton t which, in the opinion of the House, rendered that Act ffectual to accomplish the Congressional intent, and re- red the passage of the Norris-La Guardia Act to effect t intent by overriding those decisions.

Two of the decisions to which the report specifically refers this respect are those cited in Judge Robert's opinion, the *plex Printing Press* case, supra, and the *American Steel undries* case, supra. The report, however, refers to a rd case not cited by Mr. Justice Roberts, *Bedford Cut ne Company* v. *Journeyman Stone Cutters Association*, U. S. 37, 71 Law Ed. 916.

n two of these cases, the *Duplex Printing* case and the *dford Stone* case, while this Court enjoined different types strike activities, both were enjoined on the specific ground t such strikes constituted a conspiracy in restraint of erstate commerce, in violation of Section 1 of the Sherman ti-trust Act. In the *American Steel Foundries* case, the isdiction seems to have been founded solely on diversity citizenship.

In the *Duplex Printing* case, this Court, Justices Brandeis, Holmes and Clarke dissenting, reversed the Circuit Court of Appeals for the Second Circuit, which had denied an injunction because of the doubt of that court of the right to enjoin under Sections 6 and 20 of the Clayton Act. In that case, an international union, through a local, was conducting a strike against a manufacturer of printing presses located at Battle Creek, Michigan. An injunction was asked against the international union, restraining it from warning customers in New York not to purchase or install presses made by the manufacturer, on pain of sympathetic strikes; from notifying a trucking company employed by such customer not to haul such presses; from notifying repair shops not to repair them; and from "resorting to a variety of other modes to prevent the sale of presses of complainant's manufacture in or about New York City and the delivery of them in interstate commerce."

This Court expressly held that such sympathetic strike activities constituted "a nation-wide blockade of the channels of interstate commerce."

The Court said, at pages 477-478:

> "The present case furnishes an apt and convincing example. An ordinary controversy in a manufacturing establishment, said to concern the terms or conditions of employment there, has been held a sufficient occasion for imposing a general embargo upon the products of the establishment and a nation-wide blockade of the channels of interstate commerce against them, carried out by inciting sympathetic strikes and a secondary boycott against complainant's customers, to the great and incalculable damage of many innocent people far remote from any connection with or control over the original and actual dispute,—people constituting, indeed, the general public upon whom the cost must ultimately fall, and whose vital interest in unobstructed commerce constituted the prime and paramount concern of Congress in enacting the Anti-trust Laws, of which the section under consideration forms, after all, a part."

In the *Bedford Stone* case, supra, this Court likewise reversed a Circuit Court of Appeals, in this instance for the th Circuit. That Court had affirmed a decree of the District of Indiana dismissing a bill to enjoin an alleged conspiracy in violation of the Sherman Anti-trust Act. This Court held that the enforcement by a stone cutters international union, of a rule forbidding its members to handle one partly fabricated by non-members of the union, constituted a violation of Section 1 of the Sherman Anti-trust Act (Act July 2, 1890, c.647, Sec. 1, 26 Stat. 209, Title 15, 1, Sec. 1, U. S. C. A.), and might be enjoined at the instance of quarriers and fabricators of stone produced by on-union labor. This Court specifically based the right to n injunction upon its finding that the primary aim and necessary consequence of the enforcement of such a rule was curtail the demand for such stone in interstate commerce, nd. therefore, constituted a violation of the Sherman Anti-rust Act, notwithstanding that the ultimate purpose might e to promote the interests of the union and its members by inging about the employment of such members by the complaining quarriers and fabricators.

The Court said, at page 47:

> "Respondents' chief contention is that 'their sole and only purpose * * * was to unionize the cutters and carvers of stone at the quarries.' And it may be conceded that this was the ultimate end in view. But how was that end to be effected? The evidence shows indubitably that it was by an attack upon the use of the product in other states to which it had been and was being shipped, with the intent and purpose of bringing about the loss or serious reduction of petitioners' interstate business, and thereby forcing compliance with the demands of the unions. And, since these strikes were directed against the use of petitioners' product in other states, with the plain design of suppressing or narrowing the interstate market, it is no answer to say that the ultimate object to be accomplished was to bring about a change of conduct on the part of petitioners in respect of the employment of union members in Indiana. A

> restraint of interstate commerce cannot be justified by the fact that the ultimate object of the participants was to secure an ulterior benefit which they might have been at liberty to pursue by means not involving such restraint."

Moreover, this Court held that, while an individual might lawfully refuse to perform any work, a refusal in concert with other individuals was unlawful.

The Court said, in this respect, at page 54:

> "An Act which lawfully might be done by one, may, when done by many acting in concert take on the form of a conspiracy and become a public wrong, and may be prohibited if the result be hurtful to the public or to individuals against whom such concerted action is directed."

It is most significant in this connection that the House Report expressly justifies the enactment of Section 5 of the Norris-La-Guardia Act on the application by this Court of the above doctrine to the restraint of interstate commerce.

Page 8 of the House Report in this respect reads as follows:

> "Section 5: This section provides that no United States court shall have jurisdiction to issue an injunction upon the ground that the persons participating in a labor dispute are engaging in an unlawful combination because of the doing in concert of the acts enumerated in section 4.
>
> This section is included principally because many of the objectionable injunctions have been issued under the provisions of the anti-trust laws, a necessary prerequisite for invoking the jurisdiction of which is a finding of the existence of a conspiracy or combination and without which no injunction could have been issued. For example, in the case of Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association (274 U. S. 37) a 7 to 2 decision, where there was simply a rule by the association forbidding the members from working on the 'unfair' stone of the complainant, the Supreme Court

held that while it was lawful for members independently to refuse to work, when they refused in concert, it became a combination, and when this unreasonably interfered with interstate commerce, it could be enjoined under the anti-trust laws, resulting in the members being enjoined from refusing to work."

In the *American Steel Foundries* case, it has already been oted that the federal jurisdiction was apparently based olely on diversity of citizenship, and not on interference ith interstate commerce. This Court there held that, espite Section 20 of the Clayton Act, a union could be njoined from maintaining a picket line though, as the House eport states, at page 8:

"There was practically no fraud or violence"

t will be noted that Section 4 (e), (f) and (g) of the orris-La Guardia Act are directed to the overriding of his decision.

While the House Report does not specifically mention the ecision of this Court in *Hitchman Coal & Coke Company* v. *litchell,* 245 U. S. 269, 62 Law Ed. 260, as one of the udicial constructions of the Clayton Act which the Norris-a Guardia Act was intended to override, it is clear that ection 3, the "yellow dog contracts" section of the Norris-a Guardia Act was specifically occasioned by that decision.

In connection with Section 3 of the Norris-La Guardia ct, the House Report, however, notes that Section 3, unlike ection 5, is not essentially concerned with interstate com-nerce. The House Report states, at page 7:

"This section in no wise is concerned with interstate commerce or the application of the Sherman Act and its amendments, but the Federal courts obtain jurisdiction in cases involving such contracts, by virtue of diversity of citizenship and injunctions have been issued in the Federal courts on the basis of such contracts of employment."

It is clear, therefore, that the provisions of the Norris-La Guardia Act, forbidding the issuance of injunctions in connection with strikes growing out of labor disputes, not only do not expressly exclude from the protection of that Act strikes which restrain interstate commerce, but that it was the obvious intent of the Congress to prohibit injunctions even where strikes do restrain such commerce. Two out of the three decisions of this Court, the *Duplex Printing* case and the *Bedford Stone* case, which the House Report shows it was avowedly the intention to override, not only concerned strikes restraining interstate commerce, but such restraint of interstate commerce was the sole ground of the jurisdiction of this Court in those cases.

It is true that in the third case specifically mentioned in the House Report, the *American Steel Foundries* case, and in the *Hitchman* case, not specifically mentioned but obviously the target for Section 3 of the Act, the jurisdiction of this Court arose solely by reason of diversity of citizenship, and not because the strikes there enjoined involved in any way restraint of interstate commerce. Can it be said, however, in the absence of specific declaration in the Act itself, that it follows that the purpose of the Act was to prohibit injunctions only in cases where there is fortuitous diversity of citizenship, but to permit the enforcement of "yellow dog contracts" and prohibitions against picketing where there is no such fortuitous diversity of citizenship?

The answer is obvious.

Treated as a purely jurisdictional Act, which, obviously, the Norris-La Guardia Act is not, if it had been intended to confine the scope of that Act to cases where the jurisdiction of this Court arose solely by reason of diversity of citizenship, the first sentences of Sections 1, 4, 5 and 7 of the Act should have read:

> "No Court of the United States shall have jurisdiction *by reason of diversity of citizenship, etc.*"

Indeed, if it was intended so to restrict the scope of that Act, such express limitation was essential, since, unless the Federal courts had jurisdiction by reason of diversity of citizenship, those courts otherwise could issue no such injunctions except in cases where there was substantial restraint of interstate commerce.

As will subsequently be shown, however, the Norris-La Guardia Act is not purely a jurisdictional act, and any such suggested limitation of its scope would condemn the propriety of the declaration of public policy in Section 2 of that Act, as well as defeat the obvious intent of the Act to make lawful on the part of labor the actions specifically enumerated in Section 4 of the Act.

First, however, it is desired to point out that the construction of the Norris-La Guardia Act here contended for already has judicial sanction.

In *Wilson & Company* v. *Birl*, 27 Fed. Supp. 915, Judge Kirkpatrick of the District Court of the Eastern District of Pennsylvania, said at page 917:

> "The Norris-La Guardia Act, 29 U. S. C. A. Sec. 101 et seq., was intended to limit drastically the power of the Federal courts to issue injunctions in labor disputes. In fact, it might be said in a general way that the purpose was to put an end to it, except for a residue of jurisdiction necessary for the protection of property against destruction by violence or fraud.
>
> *To accomplish the purpose of the Act, Congress enumerated in Sec. 4 various types of conduct as to which jurisdiction to enjoin was taken away. The list covered a wide field of labor conflict activities and impliedly recognized the conduct in question as legitimate measures of offense and defense in labor disputes.*
>
> In this enumeration the Act is wholly objective. It is not concerned with the purpose for which the acts are done or with the state of mind of the participants or with any question of intent, expressed or presumed. The law makes no distinction between doing the acts in question with a legal object in view and doing them with an illegal object. See Levering & Garrigues Co. v. Mor-

rin, 2 Cir., 71 F. 2d 284. *In short, it was an adoption of the philosophy of Justice Brandeis's dissenting opinion in Duplex Printing Press Co. v. Deering, 254 U. S. 443, 41 S. Ct. 172, 183, 65 L. Ed. 349, 16 A. L. R. 196, which condemned the point of view which made conduct actionable 'when done for a purpose which a judge considered socially or economically harmful and therefore branded as malicious and unlawful.'* The only question is whether the acts which the plaintiff seeks to restrain are among those enumerated in Sec. 4 of the Act. If they are, this Court has no power to enjoin them.

Hence, it is immaterial whether the closed shop, plainly the objective of the defendants' program is, by the law of Pennsylvania, a legal or an illegal end, *and, for the same reasons, were it not for the decisions of the Circuit Court of Appeals for this Circuit in Apex Hosiery Co. v. Leader, 3 Cir., 90 F. 2d 155 (a matter to be discussed later), I should have said that it was also immaterial whether or not the defendants intended to restrain interstate commerce.*" (Italics supplied).

In connection with the reference of Judge Kirkpatrick to the decision of the Circuit Court of Appeals of the Third Circuit in *Apex Hosiery Company* v. *Leader,* 90 Fed. (2d) 155, it should be noted that the decision of the Circuit Court of Appeals there referred to, which Court then consisted of Judges Buffington, Davis and Dickinson, reversed the original refusal of Judge Kirkpatrick to issue an injunction in connection with the very strike here involved. *Apex Hosiery Company* v. *Leader,* 20 Fed. Supp. 138.

It is further to be noted that that decision of the Circuit Court of Appeals, however, has been repudiated as erroneous in the subsequent decision of that Court, composed, however, of Judges Biggs, Maris and Clark, in connection with the judgment of that Court which is the subject of the present writ of certiorari from this Court. *Leader* v. *Apex Hosiery Company,* 108 Fed. (2d) 71, 81.

Assuming, therefore, that the provisions of the Norris-La Guardia Act, forbidding the issuance of injunctions in

connection with strikes growing out of any labor dispute, extend to strikes which restrain interstate commerce, can it be seriously suggested that, while labor unions and their members may not be enjoined from conducting such strikes, they may conduct them not only at the peril, but with the certainty of liability for triple damages?

That question supplies its own answer. Such could not have been the intent of the Congress. To hold that it was, would be to subject a labor union and its members, under Section 4 of the Clayton Act, to inevitable liability for triple damages for doing, in the course of a strike restraining interstate commerce, the very acts which the Congress, in the Norris-La Guardia Act, has declared that it is necessary, in the public policy, that labor unions be permitted to do, free of restraint.

It may be suggested that the Congress, nevertheless, has not, either in the Norris-La Guardia Act or elsewhere, expressly provided that strikes growing out of labor disputes, although they restrain interstate commerce, shall not be held combinations or conspiracies in restraint of trade or commerce, within the meaning of Section 1 of the Sherman Anti-trust Act. The answer is that, while Congress has not expressly so provided, it must be held to have done so by necessary implication, in order to avoid, among other absurdities, the one just suggested. In this connection, it is to be noted that Section 15 of the Norris-La Guardia Act provides

> "All Acts and parts of Acts in conflict with the provisions of this chapter are hereby repealed."

As has already been suggested, however, the Norris-La Guardia Act is not merely a jurisdictional Act, but includes declarations of public policy and of substantive rights of labor, which would be beyond the competence of the Congress unless related to interstate commerce. This brief will therefore proceed to discuss the relevance of these considerations to the proposition which this brief has advanced.

II.

The declaration of public policy and the specific declarations of the substantive rights of labor, which the Congress has made in the Norris-La Guardia Act, would be beyond the competence of the Congress unless related to interstate commerce.

This being so, it would be paradoxical to argue that, because a strike affects interstate commerce to the extent of restraining such commerce, it thereby goes beyond the right to strike declared by that Act.

It has been seen that the jurisdiction of the Federal courts to issue injunctions under the Sherman Anti-trust Act must be based either upon diversity of citizenship or upon restraint of interstate commerce. It has also been seen that the provisions of the Norris-La Guardia Act, withdrawing from Federal courts jurisdiction to issue injunctions in connection with labor disputes, cannot, within the intent of Congress, be limited to injunctions where the jurisdiction of the Federal courts depends solely upon diversity of citizenship, but that such withdrawal of jurisdiction must extend to injunctions where the jurisdiction of those courts would be based on restraint of interstate commerce.

It would be even more absurd to suggest that the declaration of public policy in that Act, and its specific declarations of the substantive rights of labor, could be limited to those cases in which the jurisdiction of the federal courts attach solely by reason of diversity of citizenship. This would mean that the Congress would thereby have undertaken to make its declaration of policy and its declarations of substantive rights in a field in which the Congress was powerless to act unless its action had some necessary relation to the regulation of interstate commerce.

Indeed, the first Senate Report on the Norris-La Guardia Act refused to concur in the declaration of public policy proposed by that Act on the very ground that

> "there is a serious question of the power of Congress to make a valid declaration of policy upon any subject which lies outside the realm of federal authority" (Senate Report 1060, 71st Congress, 2nd Session).

It must, therefore, be assumed that when the Senate finally concurred in the House Report in substance (Senate Report 163, 72nd Cong. 1st Session), and joined in enacting that very declaration of public policy, the Senate must have assumed, and rightly assumed, that such declaration of policy was intended to be, and was related to interstate commerce.

Likewise, it must be clear that when both the House and Senate concurred in enacting Sections 3, 4 and 5 of the Norris-La Guardia Act, containing as they do not only restraints on the jurisdiction of the Federal courts, but substantive declarations of the rights of labor, that both the Senate and the House assumed such declarations of the rights of labor related to rights of labor in or affecting interstate commerce, since otherwise they would be beyond the competence of the Congress.

It would be a final absurdity, therefore, to hold that if the substantive rights of labor so declared by the Congress to be within the public policy of the United States, can only be effectively exercised by means of a strike restraining interstate commerce, they either may not be exercised at all, or may be exercised only with the certainty of liability to triple damages as the price of their exercise.

It is respectfully submitted that any such construction of the Norris-La Guardia Act would constitute a repetition of the judicial nullifications of the intent of the Congress in the passage of Sections 6 and 20 of the Clayton Act, which further nullification of such intent it was the express purpose of the Congress to prevent by enacting the Norris-La Guardia Act.

It is, therefore, respectfully submitted that this Court should hold that a labor union, by means of a strike, may intentionally and substantially restrain interstate commerce, without thereby rendering either it or its members liable to triple damages under Section 4 of the Clayton Act, provided that the ultimate purpose of such strike is the exercise of the rights of labor declared by the Norris-La Guardia Act, and that such restraint of interstate commerce is merely a necessary and appropriate means for the exercise of such rights.

Respectfully submitted,

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